No. 80-497

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAUL EMMETT TOWRY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
AL J. DANIEL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether petitioner is entitled to judicial review of the administrative determination of his claim under the Military Claims Act, 10 U.S.C. 2733, and the Foreign Claims Act, 10 U.S.C. 2734.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A17-A18) is reported at 620 F.2d 568. The opinion of the district court (Pet. App. A1-A17) is reported at 459 F. Supp. 101.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1980. The petition for a writ of certiorari was filed on September 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Petitioner, a retired Army officer at all pertinent times, was living in Japan in 1972. He suffered a suspected heart attack and was being transported by a military ambulance to an Army hospital when the vehicle became involved in an accident (Pet. App. A1).

Based on his alleged injuries, petitioner filed a claim for $375,000 with the Secretary of Defense under the Military Claims Act, 10 U.S.C. 2733 (Pet. 2-6), and the Foreign Claims Act, 10 U.S.C. 2734 (Pet. 6-8). Pursuant to a delegation of authority, the Secretary of the Air Force determined that petitioner should be offered $50,000 in settlement of his claim (Pet. App. A1-A2).

Dissatisfied with this determination, petitioner sued the United States, the Secretary of Defense, and the Secretary of the Air Force in the United States District Court for the Eastern District of Louisiana. He alleged that his injuries resulted from the negligence of Army personnel, "that the final determination of the Secretary was not in accordance with law, and

that absent judicial review a serious miscarriage of justice will ensue" (Complaint ¶¶ 6, 14; Pet. App. A3). Petitioner sought judgment against the defendants for $375,000, together with such additional relief as the court deemed appropriate. Jurisdiction was alleged under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and 28 U.S.C. 1331 (Pet. App. A3).

The government moved to dismiss petitioner's complaint on the grounds that the district court lacked subject-matter jurisdiction and that the claim was barred by sovereign immunity (Pet. App. A3-A4). The district court granted the government's motion and dismissed petitioner's complaint (*id.* at A5-A6):

> *Califano* v. *Sanders*, 430 U.S. 99 * * * (1977), precludes reliance on the APA as an independent jurisdictional basis for this action. Additionally, we have concluded that, because of the sovereign immunity of the United States, this court is without jurisdiction to grant an award of money damages against the defendants. Further, we find that judicial review of the final agency action which forms the basis of this litigation is statutorily precluded; thus, 28 U.S.C. § 1331(a), as amended in 1976, does not contain a grant of subject matter jurisdiction over this cause.

The court of appeals affirmed "on the basis of the district court's opinion" (Pet. App. A18).

ARGUMENT

Under the Military Claims Act, the Secretary of the affected branch of the military "may settle, and pay in an amount not more than $25,000, a claim against the United States for * * * personal injury or death * * * caused by a civilian officer or employee

* * * acting within the scope of his employment, or otherwise incident to noncombat activities * * *." 10 U.S.C. 2733(a). If the Secretary considers that a claim under the Act that exceeds $25,000 is "meritorious * * * he may pay the claimant $25,000 and report the excess to Congress for its consideration." 10 U.S.C. 2733(d).

Similarly, the Foreign Claims Act empowers the Secretary "to settle and pay any claim for not more than $25,000, for * * * personal injury to * * * any inhabitant of a foreign country * * * if the * * * personal injury * * * occurs outside the United States * * * and is caused by, or is otherwise incident to noncombat activities of, the armed forces * * * or is caused by a member thereof or by a civilian employee of the military department * * *." 10 U.S.C. 2734(a). In the event the Secretary considers such a claim that exceeds $25,000 to be "meritorious * * * he may pay the claimant $25,000 and certify the excess to Congress as a legal claim for payment from appropriations made by Congress therefor * * *." 10 U.S.C. 2734(d).

Under both the Military Claims Act and the Foreign Claims Act, the Secretary's authority to "settle" a claim "means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance." 10 U.S.C. 2731. The Secretary's settlement of a claim pursuant to these sections is, "[n]otwithstanding any other provision of law, * * * final and conclusive." 10 U.S.C. 2735.

Petitioner contends that these Acts authorize a dissatisfied claimant to seek judicial review of the Secretary's disposition of his claim and thereby obtain a higher award from the United States. However, it is well established that "the United States, as sover-

eign, 'is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' *United States* v. *Sherwood*, 312 U.S. [584, 586 (1941)]." *United States* v. *Testan*, 424 U.S. 392, 399 (1976). Such consent must be explicit and unequivocal, and cannot be implied (*ibid.*). See also *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).[1]

As the courts below correctly held, nothing in the Acts establishes a judicial cause of action against the United States for such claims or otherwise waives the government's sovereign immunity. Rather, Congress has created an administrative process to dispose of claims like petitioner's, and that is the full extent of the relief he may seek from the United States. See *United States* v. *Testan*, *supra*, 424 U.S. at 398-404. Since there has been no waiver of sovereign immunity with respect to judicial actions upon such claims, the lower courts properly dismissed petitioner's complaint for monetary relief against the United States.[2]

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[1] Although petitioner named as defendants the Secretary of Defense and the Secretary of the Air Force in addition to the United States, it is clear that the suit is brought against the sovereign because the "judgment sought would expend itself on the public treasury." *Land* v. *Dollar*, 330 U.S. 731, 738 (1947). See also *Brown* v. *GSA*, 425 U.S. 820, 826-827 (1976); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

[2] The Federal Tort Claims Act is inapplicable to petitioner's claim because it does not cover "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). Moreover, the Administrative Procedure Act is not a waiver of the government's sovereign immunity from claims such as petitioner's because it does not provide a cause of action for money damages (5 U.S.C. 702) and does not apply where other "statutes preclude judicial review" (5 U.S.C. 701).

In addition to being barred by sovereign immunity, petitioner's action is foreclosed by 10 U.S.C. 2735, which states that "[n]otwithstanding any other provision of law" the Secretary's "settlement of a claim * * * is final and conclusive." Judicial review would be inconsistent with the "final and conclusive" character of the Secretary's determination. By its express terms, therefore, Section 2735 precludes judicial review of the Secretary's "dispos[ition] of a claim, whether by full or partial allowance or by disallowance." 10 U.S.C. 2731.

Preclusion of judicial review is also apparent from the structure of the statute. Under both the Military Claims Act and the Foreign Claims Act, Congress has reserved to itself the ultimate authority to act on claims, as here, that are in excess of $25,000. See 10 U.S.C. 2733(d), 2734(d). Intervention by the courts in such cases would be contrary to this scheme.

The legislative history of the Acts confirms the congressional intent to preclude judicial review of the Secretary's settlement. In 1956 the present Acts were codified, without any change in meaning, from earlier statutes. See S. Rep. No. 2484, 84th Cong., 2d Sess. 170-173 (1956); H.R. Rep. No. 970, 84th Cong., 1st Sess. 160-163 (1955). All of the predecessor statutes contained similar finality provisions, which were incorporated into 10 U.S.C. 2735. Act of July 3, 1943, ch. 189, Section 1, 57 Stat. 372, 373 (Military Claims Act, then codified at 31 U.S.C. (1946 ed.) 223b). As noted in the committee reports accompanying the 1943 Act, claims in excess of a specified amount would have to be referred to Congress for *its* consideration. See S. Rep. No. 243, 78th Cong., 1st Sess. 2 (1943); H.R. Rep. No. 584, 78th Cong., 1st Sess. 1 (1943) (adopting Senate re-

port). A similar purpose was reflected in the Senate report on the predecessor Foreign Claims Act (Act of April 22, 1943, ch. 67, 57 Stat. 66-67 (then codified at 31 U.S.C. (1946 ed.) 224d)). See S. Rep. No. 145, 78th Cong., 1st Sess. 1-2 (1943).

The Military Personnel Claims Act of 1945, ch. 135, 59 Stat. 225 (then codified at 31 U.S.C. (1946 ed.) 222c) was part of the 1956 recodification at 10 U.S.C. (1952 ed. Supp. IV) 2732. It contained a finality provision substantially the same as 10 U.S.C. 2735, and was intended to provide an administrative forum for claims that previously could only be entertained by private bills in Congress. See H.R. Rep. No. 237, 79th Cong., 1st Sess. (1945). Significantly, one of the claims statutes replaced by the 1945 Act was the Act of March 3, 1885, ch. 335, 23 Stat. 350, which neither created a cause of action against the United States nor allowed judicial review of administrative determinations. See *United States* v. *Babcock*, 250 U.S. 328 (1919).

After its recodification at 10 U.S.C. (1952 ed. Supp. IV) 2732, the Military Personnel Claims Act was subsequently reenacted and revised as a separate claims statute. See Military Personnel and Civilian Employees' Claims Act of 1964, Pub. L. No. 88-558, 78 Stat. 767-768, 31 U.S.C. 240 *et seq.* This Act includes a finality provision identical to 10 U.S.C. 2735. See 31 U.S.C. 242. As the Senate report explained, "[t]he purpose of this bill is to extend to other agencies of the Government the authority now possessed by the military departments * * * with respect to the settlement of claims * * *. '[T]he provisions of [the bill] were drafted to conform with the language of sections 2732 and 2735 of title 10 * * *.'" S. Rep. No. 1423, 88th Cong., 2d Sess. 1, 2 (1964). The re-

port emphasized (*id.* at 6) that "the settlement of a claim under the proposed act is to be final and conclusive. Section 2735 of title 10 * * * contain[s] similar language." And "[a]ttached and made a part of [the] report" (*id.* at 7) was a letter from the Department of the Interior that noted (*id.* at 9) that "[n]o provision is made for appeal to the courts. On the contrary, the bill provides that the administrative settlement of a claim is final and conclusive."

In 1972, Congress expanded the coverage of 10 U.S.C. 2735. In so doing, Congress evinced its understanding that administrative settlements under the Military Claims and Foreign Claims Acts were final and conclusive and therefore not subject to judicial review:

> [T]he purpose of section 2735 * * * is clearly to provide for finality of settlement in military claims matters * * *.
>
> * * * * *
>
> The effect of the provision as to finality is merely to provide that a final settlement is final in the full sense of the word and will not be subject to reopening as to that specific claim.

S. Rep. No. 92-1056, 92d Cong., 2d Sess. 2, 3 (1972). The courts below correctly found (Pet. App. A13) that this legislative history of the 1972 amendment "support[s] * * * [the] conclusion that [Section] 2735 precludes judicial review of factual agency determinations under the Military and Foreign Claims Acts * * *."

This Court has long recognized that Congress may provide a statutory remedy to be determined exclusively through an administrative process with no recourse to the courts. As Justice Brandeis explained in *United States* v. *Babcock*, *supra*, 250 U.S. at 331:

> These general rules are well settled: (1) [t]hat the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts * * * [and] (2) [t]hat where a statute creates a right and provides a special remedy, that remedy is exclusive.

This principle has been consistently applied in a variety of contexts. See, *e.g.*, *Morris* v. *Gressette*, 432 U.S. 491 (1977); *Briscoe* v. *Bell*, 432 U.S. 404 (1977); *United States* v. *Testan*, *supra*, 424 U.S. at 403-404; *Johnson* v. *Robison*, 415 U.S. 361 (1974); *Fein* v. *Selective Service System*, 405 U.S. 365 (1972); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Lessee of Hickey* v. *Stewart*, 44 U.S. (3 How.) 750 (1845); *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1845); see also *Califano* v. *Sanders*, 430 U.S. 99, 104-105 (1977). In light of the language, structure, and legislative history of the Acts, it is clear that the Secretary's settlement determination is not judicially reviewable.

In line with this analysis, the only other court to consider the question has held that 10 U.S.C. 2735 precludes judicial review of the Secretary's disposition of a claim under the Military Claims Act. See *Bryson* v. *United States*, 463 F. Supp. 908 (E.D. Pa. 1978).[3] *Welch* v. *United States*, 446 F. Supp. 75

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[3] We also note that the courts have consistently held that judicial review under closely related statutes is precluded in view of finality provisions substantially identical to Section 2735. See *United States* v. *Babcock*, *supra* (predecessor to Military Personnel Claims Act of 1945, discussed at page 6, *supra*); *Preferred Insurance Co.* v. *United States*, 222 F.2d 942 (9th Cir.), cert. denied, 350 U.S. 837 (1955) (Military Personnel Claims Act of 1945, discussed at page 6, *supra*); *Macomber* v. *United States*, 335 F. Supp. 197 (D.R.I. 1971)

(D. Conn.), aff'd, 578 F.2d 1372 (2d Cir. 1978) (table), upon which petitioner relies (Pet. 16-18), is not to the contrary. In *Welch*, the court held that Section 2735 did not bar review of what it regarded to be a pure "question of law" (446 F. Supp. at 76) —whether the decedent's death was "incident to his service" and thus not compensable by the Secretary under 10 U.S.C. 2733(b)(3). While we disagree with this interpretation, the narrow holding in *Welch* does not in any event support petitioner here. Petitioner's dispute does not involve the legal issue of the Act's coverage, but rather relates solely to the Secretary's factual, discretionary determination of the proper amount of a settlement for petitioner's alleged injury. Indeed, *Welch* acknowledged, consistent with the holding in the present case, that "[t]he Military Claims Act does not enable private litigants to bring suit against the federal government, as does the Federal Tort Claims Act * * *," but instead authorizes the Secretary to settle claims covered by the Act (446 F. Supp. at 76). Thus, *Welch* does not conflict with the decisions below.[4]

(Military Personnel and Civilian Employees' Claims Act, discussed at pages 6-7, *supra*).

[4] In addition, petitioner's due process claim (Pet. 21-25) is insubstantial. As discussed above, the Acts create no cause of action against the United States, and hence petitioner's only "propery interest" (*id.* at 22) consists of the administrative determination that he has already been provided. Nor does it violate the Due Process Clause for Congress to confine a statutory remedy to an administrative procedure and preclude judicial review. See, *e.g.*, *Califano* v. *Sanders*, *supra*, 430 U.S. at 108-109; *United States* v. *Testan*, *supra*, 424 U.S. at 401, 403-404.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
AL J. DANIEL, JR.
Attorneys

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